SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1238

A. J. BATTERTON, EXECUTOR OF THE WILL OF MARY TODD BATTERTON, DECEASED,
Petitioner.

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, A. J. Batterton, executor of the will of Mary Todd Batterton, deceased, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on January 28, 1969.

OPINIONS BELOW

The opinion of the District Court (App. 9-16) is not reported officially. It is reported unofficially in 21 AFTR 2d 1706. Neither the initial opinion of the Court of Ap-

peals (App. 3-7), nor its opinion on rehearing (App. 1-2) are yet reported officially. The initial opinion is reported unofficially in 23 AFTR 2d ¶ 147,304, and the opinion on rehearing at 23 AFTR 2d ¶ 147,314.

JURISDICTION

The initial judgment of the Court of Appeals was entered on December 10, 1968 (App. 8). A timely petition for rehearing was denied on January 28, 1969 (App. 1-2). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a testamentary gift simply "for Public Charities" qualifies for a charitable deduction under I.R.C. §2055 even though the testator failed to limit the gift by words such as "for Public Charities described by Section 2055 of the Internal Revenue Code."

2. Whether a testamentary gift to a surviving spouse qualifies for a marital deduction under I.R.C. §2056 even though the gift is limited by the fact that the surviving spouse may give the property away only to a charity, a gift to which would qualify for a charitable deduction under I.R.C. §2055.

STATUTES INVOLVED

The statutes involved—I.R.C. §2055 (relating to charitable deductions for estate tax purposes) and I.R.C. §2056 (relating to the estate tax deduction for bequests to a surviving spouse)—are printed in Appendix B, infra, pp. 16-20.

STATEMENT

Petitioner, as executor of his wife's estate, instituted this suit to recover Federal estate taxes erroneously assessed and collected as a result of the Commissioner of Internal Revenue's denial to the estate of the marital deduction under Internal Revenue Code of 1954, §2056, 26 U.S.C. §2056 (hereinafter cited as I.R.C. §2056).[1] The case, as decided by the Court of Appeals for the Fifth Circuit on rehearing, also implicates an issue respecting the interpretation of Internal Revenue Code of 1954, §2055 dealing with charitable deductions.[2]

The facts may be summarized as follows:

A man and his wife both desired to dispose of their property at death by leaving to the survivor whatever the survivor needed or wished to use; anything that was left would go to charity. To effectuate their desire, they consulted a lawyer who, like most lawyers throughout the towns and cities of America, was not an expert in the subtleties of the estate tax provisions of the Internal Revenue Code. The plan which the lawyer devised and which petitioner and his wife executed was as follows:

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1. Initially, the suit also contested the denial of a charitable deduction as well. The district court held that the estate was not entitled to a charitable deduction because the amount of the charitable bequest was not ascertainable (R. 81-82). Although petitioner contested this ruling before the Court of Appeals, the Court of Appeals did not discuss the estate's entitlement to a charitable deduction, and petitioner does not raise the question here. The charitable deduction question which *is* presented here arises out of the Court of Appeals' disposition of the marital deduction question, not out of the charitable deduction question raised by petitioner below.

2. The jurisdiction of the district court was invoked under 28 U.S.C. §1346(a)(1) because the case arises under the Internal Revenue Code.

1. Each spouse executed a will leaving his or her entire estate to the surviving spouse if he or she survived; otherwise everything went to the United Christian Missionary Society (App. 4).

2. Petitioner and his wife simultaneously executed a contract in which they agreed that (a) neither would, without the consent of the other, change his or her will and, (b) neither would make an *inter vivos* gift, (i.e., without fair consideration), "except [gifts] for Public Charities" (App. 4).

Petitioner's wife died on April 21, 1962 (App. 4). Petitioner inherited all of her property under the terms of the will to do with as he pleased. Under the contract, however, he could not give away his inheritance except "for Public Charities," and on his death whatever was left would go to the United Christian Missionary Society (App. 4-5).

At issue in the lower courts were several questions of state law the resolution of which petitioner does not question here: The Court of Appeals ruled that the will-cum-contract created under state law a life estate with unlimited power to invade, restricted however by the fact that petitioner could give the property away only "for Public Charities" with remainder over on his death to the United Christian Missionary Society. The Court of Appeals recognized that a gift of a life estate to a surviving husband would qualify for the marital deduction "provided the husband is given the absolute power of control and disposition of the property constituting the life estate either by power of appointment or by his own will" (App. 5). Since, however, the surviving husband in this case did not have these precise powers, the gift to him did not qualify for the marital deduction.

By petition for rehearing, petitioner argued that the statutory purpose implicit in the charitable deduction section (I.R.C. §2055) required the court to interpret the general language of the marital deduction provision (I.R.C. §2056) so as to permit a marital deduction when the only limitation on the surviving spouse's power of disposition over the property was one which would require the property to go to a charity which would qualify for a deduction under the charitable deduction section.

In its opinion denying the petition for rehearing, the court stated that it had found petitioner's argument "appealing" and "[a]ssum[ed]" (App. 1-2) that the court had power to so construe the statute "in order to achieve the true intent of Congress" (App. 2). However, the court then went on to deny petitioner's claim on the ground that his argument did not apply because petitioner could give the property away, not only to charities that would qualify under I.R.C. §2055, but also to charities that would not so qualify. (The court noted that I.R.C. §§503 and 681 deny the deduction provided for in I.R.C. §2055 for gifts to organizations or trusts which participate in certain prohibited transactions.) The court concluded that petitioner could give his property away to "Public Charities" which would nevertheless not qualify for the deduction under I.R.C. §2055. The court stated:

> . . . [T]here is no necessary relation between the "charities" to which the surviving spouse here was permitted to make gifts or bequests and the "charities" covered by Section 2056 [sic; should be "2055")[2a]

2a. Petitioner wrote to the Court suggesting that the reference to §2056 should have been to §2055. The Court replied that Petitioner was correct, that the Court had made an error, and that the correction would be made in the proofs which would be submitted to the Court by the West Publishing Company prior to publication in the Federal Reporter. A copy of the correspondence between Petitioner and the Court of Appeals has been lodged with the Clerk of this Court.

> of the Internal Revenue Code as limited by Sections 503 and 681. Mr. Batterton's contractual and testamentary requirements as to his disposition of this estate could have been fully carried out without his ever naming a charity meeting the statutory exemption standards at all.

The court cited no cases in support of this interpretation of the charitable deduction section. Since the issue had not been briefed or argued, the court was conceivably unaware that its decision was in direct conflict with what may fairly be described as an entire body of tax law holding that general language reflecting a charitable intention is all that is required to qualify a testamentary gift for a charitable deduction.

Having already filed a petition for rehearing, petitioner had no other remedy but to seek review in this Court on the basis of this conflict.

REASONS FOR GRANTING THE WRIT

1. We are not aware that even the Commissioner has ever taken as extreme a position as has the Court of Appeals here that a testamentary gift "for Public Charities" does not qualify for a charitable deduction. The most extreme cases we have found are those in which the Commissioner has argued that the deduction will fail if the testator uses language such as "benevolent" rather than "charitable." The courts have uniformly rejected the Commissioner's position and accordingly the authority of these cases is *a fortiori* applicable here. The leading case is *Hight* v. *United States,* 256 F.2d 795 (2d Cir. 1958), in which the testamentary gift was for "such charitable, *benevolent,* religious *or* educational institutions as my executors hereinafter named may determine" (256 F.2d at 797; emphasis supplied). The court held:

> The overwhelming weight of authority supports the principle that the word "benevolent" particularly when used with the word "charitable" applies to institutions which are within the scope of [the predecessor section of I.R.C. §2055] . . .
>
> In granting tax deductions for bequests of the type listed in [the predecessor of I.R.C. §2055], Congress could not have intended to encourage bequests for eleemosynary purposes only to have them defeated by narrow construction [256 F.2d at 802].

Numerous federal tax cases allowing charitable deductions and interpreting "benevolent" and "benevolence" in the same way are cited in a footnote.[3] There are, in addition, a number of cases in which courts have permitted a charitable deduction for other testamentary gifts even though the language of the gift did not precisely

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3. *St. Louis Trust Co.* v. *Burnet*, 59 F.2d 922, 927 (8th Cir. 1932) (Charitable deduction upheld; court rejects the notion that "benevolent" is broader in scope than the term "charity"); *Gossett* v. *Swinney*, 53 F.2d 772, 774 (8th Cir. 1931), *cert. denied*, 286 U.S. 545 (1932) (Charitable deduction upheld on the basis of a testamentary trust directing trustees to "apply the principal and income of said trust estate for the furtherance and development of such charitable, benevolent, hospital, infirmary, public, educational, scientific, literary, library or research purposes in Kansas City, Missouri, as said Trustees shall in their absolute discretion determine to be in the public interest"); *Rosamond Gifford Charitable Corp.* v. *United States*, 170 F. Supp. 239, 244 (N.D.N.Y. 1958) (Charitable deduction upheld on a gift to a corporation "created, managed and operated exclusively for religious, educational, scientific, charitable or benevolent uses"); *Michigan Trust Company* v. *United States*, 21 F. Supp. 482, 483 (W.D. Mich. 1937) (Upholding a charitable deduction for a gift directing that a remainder after a testamentary trust "be disposed of for such corporate charity or corporate benevolence or public purpose as my wife, Mary Silver Gilbert, may, by her last will and testament, appoint"); *Union & New Haven Trust Company* v. *Eaton*, 20 F.2d 419, 421 (D. Conn. 1927) (Upholding a charitable deduction for a bequest to a corporation whose charter stated its purpose to be the "promotion of practical benevolence in the city of New Haven"); *Holdeen* v. *Ratterree*, 292 F.2d 338, 341 (2d Cir. 1961); *Schoellkopf* v. *United States*, 124 F.2d 982, 985 (2d Cir. 1942).

track the language of the Internal Revenue Code.[4] All of these cases would have to be overruled if the Court of Appeals' super-technical interpretation of the charitable deduction section accurately applies the law. Under this interpretation, even a testamentary gift for "Public Charities" would not comply with the requirements of I.R.C. §2055.

We do not believe this is, or should be, the law. As this Court has stated, the charitable deduction provisions "were begotten from motives of public policy, and are not to be narrowly construed." *Helvering* v. *Bliss,* 293 U.S. 144, 151 (1934).[5]

This Court has also noted that "taxation is an intensely practical matter, and laws in respect of it should be construed and applied with a view toward avoiding, so far as possible, unjust and oppressive consequences" (*Farmers Loan & Trust Co.* v. *Minnesota,* 280 U.S. 204, 212 (1930). "If a general charitable purpose is manifest within the limits of the language [of the will], a broad

4. E. g., *Chicago Bank of Commerce* v. *McPherson,* 62 F.2d 393, 397 (6th Cir. 1932), *cert. denied,* 289 U.S. 736 (1933) (Charitable deduction allowed for gift for "public welfare uses"); *Koehler* v. *Lewellyn,* 44 F.2d 654 (W.D. Pa. 1930) (Charitable deduction upheld for testamentary gift "for the beneficial usage of the citizens of Sharon and vicinity, without regard to what may be deemed legal or public charities within the contemplation of the laws of Pennsylvania"); *Estate of Boyles,* 4 T.C. 1092, 1095 (1945) (Charitable deduction upheld for gift "for civic purposes in the City of Houston"); Sol. Op. 159, III-1 Cum. Bull. 480, 481 (1924) (Charitable deduction allowed for gift "to secure a site and erect thereon such an auditorium as will . . . meet the requirements and needs of the residents and citizens of the city of M to which the ownership of the building could be transferred"). The Court of Appeals in the case at bar appears to have ignored even its own holding in *Eagan* v. *Commissioner,* 43 F.2d 881 (5th Cir. 1930).

5. See also *Commissioner* v. *Estate of Sternberger,* 348 U.S. 187, 190 (1955); *Old Colony Trust Co.* v. *Commissioner,* 301 U.S. 379 (1937); *United States* v. *Provident Trust Co.,* 291 U.S. 272, 285 (1934); *Edwards* v. *Slocum,* 264 U.S. 61, 63 (1924); *Trinidad* v. *Sagrada Orden de Predicadores, etc.,* 263 U.S. 578 (1924).

and liberal construction should be applied to that language and the gift upheld" as one intended for charitable ends (*Estate of Boyles*, 4 T.C. 1092, 1095 (1945)).[6]

2. The second issue presented assumes that a gift "for Public Charities" would qualify for a charitable deduction. It raises the question as to whether a limitation on a life estate to a surviving spouse which requires the property to go to a charity for which a deduction would be allowed under I.R.C. §2055 disqualifies the life estate for the marital deduction available under I.R.C. §2056. From the point of view of statutory construction, the question is whether the latitude released by the statutory purpose reflected in the charitable deduction section is sufficient to permit a court to interpret the general language of the marital deduction section so as to permit a marital deduction when the bequest to the surviving spouse is limited by a clause which operates to require a gift to a charity which would qualify for the charitable deduction. As such, the question involves an important principle of statutory construction as applied to the tax laws.

While we cannot say that the precise question arises frequently in the course of litigation, this Court's attention is nevertheless justified because of the depressing effect the Government's position has had and will have on charitable giving. Litigation has been avoided largely because prudent tax counsel have advised against charitable remainders in a gift to a spouse because of the disqualifying effect this might have on the marital deduc-

6. Accord, *Marine Midland Trust Co.* v. *McGowan*, 223 F.2d 408 (2d Cir. 1955); *St. Louis Trust Co.* v. *Burnet*, 59 F.2d 922 (8th Cir. 1932); *Brown* v. *Commissioner*, 50 F.2d 842 (3d Cir. 1931); *Michigan Trust Co.* v. *United States*, 21 F. Supp. 482 (W.D. Mich. 1937); *Beggs* v. *United States*, 27 F. Supp. 599 (Ct. Cl. 1939); *Estate of Davis*, 26 T.C. 549, 552 (1956); *Estate of Sells*, 10 T.C. 692, 699 (1948); *Estate of Gilbert*, 4 T.C. 1006, 1010-1011 (1945).

tion. The testator who expresses a desire to leave as much as he can to charity and at the same time to make certain that his wife has everything that she may need has been advised to forego the charitable gift. Tax counsel's suspicions have here been confirmed.[7] If the Government's position is correct, a testator cannot, short of losing the benefit of the marital deduction, guarantee that the excess of his estate beyond the needs of his surviving spouse will ultimately be devoted to charitable uses. Thus, charitable giving is discouraged and the purposes of the charitable deduction provision are defeated. Accordingly, even though we cannot point to a number of cases which raise the precise issue we raise here, the question is nevertheless of substantial importance.

Moreover, the issue is also less likely to be litigated because it usually arises in connection with smaller estates. The testator with a large estate can independently fund his desire to provide for his wife and leave money to charity: Such a taxpayer simply leaves half of his estate outright to his wife and the other half to charity. The smaller estate, where the question arises, is less likely to litigate because it has neither the means

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7. While preparing this petition, counsel received the March 1969 issue of a service (Keynote Reports) sent by the hundreds of thousands to lawyers, accountants, and large customers of life insurance companies. The service reported the Court of Appeals' opinion in the instant case as follows:

> A husband wants his wife to have the use of his property during her life. But he wants the property to go to certain charities when he dies. There's no trouble carrying out these objectives. *But there's no way of carrying them out and still qualifying for the tax marital deduction.* One husband left all his property to his wife, but got her written agreement that she would not give away the property during her life and would not change her will which left the property to his favorite charities at her death. The result: no marital deduction [Emphasis supplied.]

A copy of the issue of the service from which the foregoing paragraph was taken has been lodged with the Clerk together with the record.

nor the hardihood to carry to the highest court in the land the appealing equitable issue which this case presents: to ask whether modern principles of statutory construction may be so applied as to achieve not only justice in the particular case but also fidelity to the overall purpose which Congress was trying to achieve. Petitioner is of that small but hardy band who has the stamina to ask whether the words of the statute will bear an interpretation consonant with the overall statutory purpose, even though if read with a dry and sterile literalism his claim might fail. That there are few who will litigate this matter does not mean that there are not countless others who accept defeat at the hands of the Internal Revenue agent.

Finally, an opinion by this Court interpreting so finely reticulated a statute as the Internal Revenue Code with an eye to its overall purpose will, we believe, have a radiating influence on the overall administration of the tax laws.[8]

The general scheme of the marital deduction provision (I.R.C. §2056) provides for a deduction of up to one-half the value of the adjusted gross estate for gifts to the testator's spouse. The gift must be either outright or of such a nature that the property involved, for all practical purposes, comes under the exclusive dominion and control of the spouse. The obvious purpose of such a requirement is to insure that property escaping taxation because of the marital deduction will not further escape taxation upon the death of the spouse. *United States* v. *Stapf*, 375 U.S. 118 (1963).

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8. It has been thirty-five years since this Court stated that the "intention of the lawmaker controls in the construction of taxing acts as it does in the construction of other statutes." *Helvering* v. *Stockholders Enskilada Bank*, 293 U.S. 84, 93 (1934). See also *Griffith* v. *Commissioner*, 308 U.S. 355, 358 (1939); *Commissioner* v. *Wodehouse*, 337 U.S. 369, 379 (1949).

Consistent with this purpose, Congress has provided that a life estate to a surviving spouse will qualify for the marital deduction only if:

(1) The surviving spouse is "entitled for life to *all the income*" from the property; and

(2) The surviving spouse has a general power of appointment over the property exercisable only by him "*and in all events.*" (I.R.C. §2056(b) (5)) (emphasis supplied).

The restrictions on the surviving spouse's life estate in this case are:

(1) The entitlement of the surviving spouse to "all the income" during his life is qualified by the fact that he cannot give it away except to a charity;

(2) The power of appointment required by the statute to be exercisable "in all events" is qualified (a) by the fact that the surviving spouse cannot give the property away during his lifetime except to a charity, and (b) on his death the property must go to a charity.

Except for this, the surviving spouse can do anything he wants with the property.

Petitioner urges that when the statute says "all the income" must go to the surviving spouse, that language does not include income which may be diverted only to a charity which would qualify for a deduction under I.R.C. §2055; and that statutory language requiring that a power of appointment be exercisable "in all events" does not preclude a restriction on the power which can operate only to transfer the property to charity. The broad gauge language of the statute was not intended to apply to qualifications on the surviving spouse's dominion and control which can only result in a transfer to a charity.

Here, all of that bundle of rights and interests in this property, which the law denominates a fee simple absolute, was devised in solution to the surviving spouse and to charity. Together they have the entire interest in the property. Had the decedent given all of the property to her spouse or had she given all her property to a charity, her gross estate would have been allowed a deduction of at least 50 percent. Instead, however, the decedent *combined* her desire (1) to provide *without limitation* for her husband during his life and (2) to insure that whatever remained would be devoted to charity. She did this by making a single bequest in which only her spouse and charity enjoyed the entire interest.

The decedent did not attempt to evade nor even to reduce taxes, but to accomplish two laudable ends which the Code seeks to encourage: gifts to charity and gifts to the surviving spouse. To hold in the circumstances of this case that no deduction[8a] is permitted is to add two plus two and get zero.

Petitioner recognizes that he is not entitled to a charitable deduction because the value of the charitable remainder is not presently ascertainable. *Merchants National Bank of Boston* v. *Commissioner,* 320 U.S. 256 (1943). The value of the charitable interest is unascertainable because petitioner has an unlimited power to invade the corpus. Petitioner rightly feels that if his power of invasion is of such a degree as to defeat the charitable deduction, then he should be permitted the marital deduction; yet, ironically enough, he is met with the Government's contention that the marital deduction is not available because he is permitted to give the property away only to charity. Petitioner is being told that he cannot have his charitable deduction because an un-

8a. See n. 1, *supra,* p. 3.

known portion of the property might go to him, and cannot have his marital deduction because an unknown portion of the property might go to charity. This is an unseemly dilemma which we can safely say Congress never intended to create. The Government's position here—the court below assumed petitioner was correct on this issue—would require this Court to hold that by combining two valid principles of tax law, the decedent's estate is to be deprived of the benefits of both.[9]

It should also be noted that the effect of a holding in the Government's favor would not deprive the surviving spouse of any money. He is free to spend as much as he wants on whatever he wants—to waste it, to gamble it away, to speculate with it. The effect of the ruling in favor of the Government will simply be to reduce the amount in the surviving spouse's estate which will go to charity. A decision in the Government's favor takes money not from petitioner, but from charity.

Petitioner urges, as the court below assumed to be correct, that the enduring words of Judge Learned Hand are here applicable, written, significantly enough, as a guide to the construction of a provision of the Internal Revenue Code:

> There is no more likely way to misapprehend the meaning of language—be it in a constitution, a statute, a will or a contract—than to read the words literally, forgetting the object which the document as a whole is meant to secure. Nor is a court ever less likely to do its duty than when, with an obsequious show of submission, it disregards the overriding

9. The provisions which the decedent made preclude any possibility that the property will pass to a succeeding generation or any private person without the imposition of estate or gift tax, and thus, the disposition of her estate does not conflict in any way with the policy underlying the restrictions on the marital deduction. See *United States* v. *Stapf*, 375 U.S. 118 (1963).

> purpose because the particular occasion which has arisen was not foreseen. That there are hazards in this is quite true; there are hazards in all interpretation, at best a perilous course between dangers on either hand; but it scarcely helps to give so wide a berth to Charybdis' maw that one is in danger of being impaled upon Scylla's rocks. [*Central Hanover Bank and Trust Co.* v. *Commissioner,* 159 F.2d 167 (2nd Cir. 1947), *cert. denied,* 331 U.S. 836 (1947).]

It is clear that Congress never considered the situation as to whether a bequest to a surviving spouse will qualify for a marital deduction when it contains a limitation which requires that the property ultimately go to a charity, and it is unclear from the general language of the statute whether such a situation is covered. This is one of those situations that Congress did not foresee.[10] When a court must apply a statute to a situation which Congress did not have in mind when it enacted the statute,

> [w]e can best reach the meaning here, as always, by recourse to the underlying purpose, and, with that as a guide, by trying to project upon the specific occasion how we think persons, actuated by such a purpose, would have dealt with it, if it had been presented to them at the time. To say that this is a hazardous process is indeed a truism, but we cannot escape it, once we abandon literal interpretation—a method far more unreliable. [*Borella* v. *Borden Co.,* 145 F.2d 63, 64 (2d Cir. 1944) (L. Hand, J.), *affirmed,* 325 U.S. 679 (1945).]

There are numerous examples in which modern courts, including this Court, have applied these principles in cases

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10. Any statute—and perhaps especially the Internal Revenue Code—is designed to cover a multitude of infinitely varied factual situations. "Nobody is so gifted with foresight that he can define all possible human events in advance" (Dilliard (ed.) *Spirit of Liberty* (Vintage ed. 1959), p. 81).

calling for a far more drastic departure from literalism than the case at bar. We have cited a few examples of such cases in the accompanying footnotes and have included not only non-tax cases[11] but tax cases[12] as well.

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11. A striking recent application of these principles is *Rosenberg* v. *Fleuti*, 374 U.S. 449 (1963). The statute in that case defined an "entry" for the purposes of the immigration and naturalization laws as "any coming of an alien into the United States from a foreign port or place," with two exceptions in the case of an alien with a lawful permanent residence in the United States. The first exception was where the alien's departure from the United States and presence in the foreign place was not voluntary (such as an abduction) and the second exception was where the alien's departure to a foreign place was not intended or reasonably to be expected (such as getting on the wrong train). In the *Rosenberg* case the alien could not literally fit within either of these exceptions because his departure to Mexico was both voluntary and with knowledge of where he was going. However, the alien's trip to Mexico was both casual and brief, and this Court considered whether it should construe the exceptions to the statute to include the case of an alien's entry after a brief and casual (though voluntary and knowing) departure. The court considered the legislative history of the exceptions and the purposes which they were intended to accomplish, and found that these required it to construe the exceptions to cover the case before it even though a literal reading of the statute would have precluded this result. The Congress "could not have meant to limit the meaning of the exceptions which it created . . . to the facts of those two cases." [374 U.S. at 458]. It ruled that the statute should not be "woodenly construed" [374 U.S. at 460]; the "same considerations" which led to their expanded construction apply to the case at hand.

Another similar case is *Peter Pan Fabrics, Inc.* v. *Martin Weiner Corp.*, 274 F.2d 487 (2nd Cir. 1960), which involved the notice provisions of the Copyright Act. The Copyright Act requires the notice to be "affixed to each copy" (17 U.S.C. §10) with an exception in the case of a notice which has been omitted "by accident or mistake" (17 U.S.C. §21). The court, however, construed the statute to allow intentional omission of the notice when the affixation would impair the esthetic appeal of the work and the defendant was a deliberate copyist. The court recognized the force of the maxim *expressio unius* which would seem to apply in view of Congress' express creation of an exception for omission by accident or mistake.

> . . . [I]t may be argued that the doctrine *expressio unius, exclusio alterius,* would apply: That is to say, since Congress made only "omission by accident or mistake" an excuse we must not enlarge the exemption.
>
> On the other hand, it is a commonplace that a literal interpretation of the words of a statute is not always a safe guide to its meaning. Indeed, in extreme situations this doctrine

In *Northeastern Pennsylvania National Bank & Trust Co.* v. *United States*, 387 U.S. 213 (1967) this court observed that "Congress' intent to afford a liberal 'estate-

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has been carried so far that language inescapably covering the occasion has been disregarded when it defeats the manifest purpose of the statute as a whole. *Holy Trinity Church* v. *United States*, 143 U.S. 457, 12 S. Ct. 511, 36 L.Ed. 226; *Markham* v. *Cabell*, 326 U.S. 404, 66 S. Ct. 193, 90 L.Ed. 165; *Cawley* v. *United States*, 272 F.2d 443 (2nd Cir. 1959).

. . . [A]t least in the case of a deliberate copyist, as in the case at bar, the absence of "notice" is a defense that the copyist must prove, and . . . the burden is on him to show that "notice" could have been embodied in the design without impairing its market value [274 F.2d at 489-490].

This court's recent interpretation of a statute which provided that the "district courts shall not enjoin, suspend, or restrain" the collection of a state tax provides another example. The court had no difficulty in ruling that despite the generality of the language, the statute did not apply to suits in which the United States was plaintiff. This was not, said the court, the evil which Congress was attempting to deal with (just as in the case at bar the "evil" that Congress intended to deal with in narrowly confining the life estates that will qualify for the marital deduction was the passing of property to the next generation tax free). The court concluded that the statutory purpose of the legislation did not bring within its ambit the United States as plaintiff despite the broad gauge language of the statute and the absence of any exception for the United States as plaintiff. *Department of Employment* v. *United States*, 385 U.S. 355 (1966).

12. The Second Circuit has construed language which prohibits a tax charity from attempting "to influence legislation" (26 U.S.C. 501(c)(3)) as permitting efforts on the part of a bar association to influence technical non-partisan legislation. The court reached this result despite the fact that the literal language of the statute contains no exception for attempts to influence legislation in this manner. *Dulles* v. *Johnson*, 273 F.2d 362 (2d Cir. 1959), *cert. denied*, 364 U.S. 834 (1960).

In *McGehee* v. *Commissioner*, 260 F.2d 818 (5th Cir. 1958), which also involved the marital deduction section of the Internal Revenue Code; the surviving spouse had been given a life estate but on her death the remainder was given to a private party in the event that she did not dispose of the property in her lifetime. Obviously, this did not comply with the literal words of the statute: The power of appointment was not "exercisable by such spouse . . . in all events"; it was not exercisable by will, in the event of her death without having disposed of the property. This Court ruled that "the gift over of property undisposed of prevented the gift from being in fee, but it would not limit, restrict or qualify the power of disposition." Thus, the bequest was held to come within

splitting' possibility to married couples . . . is unmistakable. . . . Plainly such a provision should not be construed so as to impose unwarranted restrictions upon the availability of the deduction." (387 U.S. at 221). In reaching a decision for the taxpayer, this Court was required not only to invalidate a Treasury regulation but, in addition, as the dissent pointedly observed, to interpret the words "specific portion" to mean "ascertainable amount." In the instant case, the problem before the Court is far easier because petitioner asks the Court only to determine whether the general language regarding permissible restrictions on life estates applies to a specific kind of restriction—requiring the property to go to a charity—a specific application of the statute's general language which Congress never considered when it enacted the marital deduction section.

What can be said to support the Government's position? Why should a limitation on a surviving spouse's

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the intendment of the marital deduction provision, even though, if the statute were applied with "relentless literalism," the Court would have been forced to acknowledge that the power of appointment was not exercisable "in all events."

Perhaps the most famous departure from literalism in tax law is *Helvering v. Gregory*, 69 F.2d 809 (2d Cir. 1934), *affirmed*, 293 U.S. 465 (1935), where the court ruled that a reorganization undergone solely for the purpose of reducing taxes would not come within the statutory definition of a reorganization even though literally it complied with the statutory definition. It should be emphasized that the court in the *Gregory* case found that there was a reorganization, and a real reorganization. Despite this and despite the fact that the statutory definition of reorganization did not exclude real reorganizations that were taken to reduce taxes, the court read into the statute this qualification in order to accomplish the statutory purpose:

> . . . All these steps [taken by the taxpayer] were real, and their only defect was that they were not what the statute means by a "reorganization," because the transactions were no part of the conduct of the business of either or both companies. [69 F.2d at 811.]

interest requiring the property to go to a charity incline a court to interpret the statute so as to deny the deduction? "The [Government has] no answer except to say that we are not free to depart from the literal meaning of the words, however transparent may be the resulting stultification of the scheme or plan as a whole." *Cabell* v. *Markham,* 148 F.2d 737 (2d Cir. 1945) (L. Hand, J.), *affirmed,* 326 U.S. 404 (1945).

We believe this Court should conclude, as it did in the *Pennsylvania National Bank* case, supra, p. 18, ". . . [W]e can find no warrant for [the Government's] narrow view, in common sense or in the statute and its history" (387 U.S. at 221-222).

CONCLUSION

Petitioner is so clearly correct on the first question presented as to warrant summary reversal on the petition for certiorari—and it may well be that the Government will consent to this disposition. As for the second question presented, the court below assumed that petitioner's position was correct. Depending on the position the Government takes in its brief in opposition, the Court may wish either to (1) order entry of judgment for petitioner; (2) set the second issue down for a full hearing on the merits; or (3) remand the case to the Court of Appeals for further consideration of the second question presented, which, if this Court reverses on the first question, will be squarely presented to the Court of Appeals.

Naturally, petitioner would clearly prefer the Court to take alternatives (1) or (2).

Respectfully submitted,

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APPENDIX A

Opinions and Judgments Below

(a) Opinion of Circuit Court of Appeals on Denial of Petition for Rehearing:

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 26263

A. J. BATTERTON, EXECUTOR OF THE WILL OF MARY TODD BATTERTON, DECEASED,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(January 28, 1969)

On Petition for Rehearing

Before TUTTLE and AINSWORTH, Circuit Judges, and MITCHELL, District Judge:

PER CURIAM: The petition for rehearing makes an appealing argument to the effect that in the peculiar circumstances of this case we should not read the statu-

tory requirements for marital deduction literally. The argument is that since the surviving spouse has full and complete right to the property during life except as to gifts to any but charitable objects, and since the power of appointment in the survivor was restricted to some charity, the Congressional purpose would be satisfied by treating the bequest as meeting the marital deduction requirements of Section 2056.

Assuming that we have the power to construe a statute contrary to its literal language in order to achieve the true intent of Congress, c.f. *Central Hanover Bank & Trust Co.* v. *Commissioner,* 159 F.2d 167 (2 Cir., 1947), *cert. denied,* 331 U.S. 836, we do not find this to be a proper case to apply the principle. The simplest answer to the contention here is that there is no necessary relation between the "charities" to which the surviving spouse here was permitted to make gifts or bequests and the "charities" covered by Section 2056 [sic; should be "2055"] of the Internal Revenue Code as limited by Sections 503 and 681. Mr. Batterton's contractual and testamentary requirements as to his disposition of this estate could have been fully carried out without his ever naming a charity meeting the statutory exemption standards at all.

Thus, we cannot say that Congress was as much interested in exempting from estate tax as a charity exemption the estate here in question as it was in permitting the surviving spouse to have the benefit of a marital deduction if properly established.

The petition is DENIED.

(b) Opinion of Circuit Court of Appeals Affirming District Court:

[Same Title]

(December 10, 1968)

Before TUTTLE and AINSWORTH, Circuit Judges, and MITCHELL, District Judge.

TUTTLE, Circuit Judge: The decision in this case turns upon our deciding whether a contract to make mutual wills, carried out by the decedent in favor of her husband by the execution of a will "pursuant to the attached contract this day made," and which was attached as an exhibit to the will, became a part of the will by incorporation in such manner as to convert what might otherwise appear to be a residuary bequest in fee simple to the husband into a life estate.

The resolution of the question is necessary to determine whether the estate of the decedent is entitled to deduct one half of the wife's separate property, thus conveyed to her husband, from the taxable estate as a marital deduction under the provisions of 26 U.S.C.A. §2056.

On May 3, 1954, A. J. Batterton and his wife, Mary Todd Batterton, the decedent, executed mutual wills, both of which, in the first paragraph, stated that they were executed "pursuant to the attached contract this day made with my [wife or husband]." A copy of a contract of the same date was attached as an exhibit to each of the wills.

Each of the wills made what appeared to be a devise and bequest to the survivor in fee simple to the other spouse of the entire estate. Each of the wills had a second paragraph which provided as follows:

> "2. Should my said husband predecease me, I give, devise, and bequeath all of my property, real, personal, and mixed, wherever situated, whereof I may be seized or possessed, or to which I may be in any manner entitled, or in which I may be interested, at the time of my death to the United Christian Missionary Society Missions Building, Indianapolis, Indiana, a corporation created by and existing under the laws of the State of Indiana, in trust nevertheless to be used for charitable purposes only the income therefrom to be divided equally between Florida Christian Home, Edgewood, Jacksonville, Florida, Hazel Green Academy, Hazel Green, Kentucky, and said United Christian Missionary Society."

The contract "pursuant" to which each of the wills was executed, and a copy of which was attached to the wills, provided as follows:

> "WITNESSETH: each hereby agrees, in consideration of the promises of each to the other, that neither will without the consent in writing of the other revoke, or make any Last Will and Testament different from, his or her Last Will and Testament copies of which are attached hereto, and that neither will during his or her lifetime make any gift, or transfer or assign any of his or her property without receiving a fair financial consideration, except for Public Charities."

Thus, it is that upon the death of Mrs. Batterton on April 21, 1962, a resident of the state of Florida, her husband became entitled to receive her entire estate which he could utilize and, if he desired, consume, subject only to the restraints imposed upon him by the will

cum-contract that he could neither give away to any person other than a public charity nor leave by will to any other than the named residuary beneficiary, the religious remainderman.

For whatever legal effect it may have, appellant, in his brief, concedes that "at the time of her death the two wills and the agreement above referred to were in full force and effect."

Stated in non-technical language, the estate of Mrs. Batterton is entitled to be reduced by the amount of a marital deduction provided for in the Federal Statutes to the extent of any fee simple bequest to her surviving husband, or to the extent of the amount left to her husband in a life estate provided the husband is given the absolute power of control and disposition of the property constituting the life estate either by power of appointment or by his own will. See 26 U.S.C.A. §2056 (b), and Federal Tax Regulations, Sections 20.2056(b)-5(a).

It is the thrust of appellant's contention here that the will stands by itself, and as such, it conveyed a fee simple estate to the husband. It is argued that the husband's obligation so to deal with the estate received by him from his wife to pass it on by his will intact to the named residuary legetee [sic], and to refrain from giving it away during his lifetime except for charitable purposes, was an obligation imposed not by the nature of the estate created by Mrs. Batterton's will, but rather by a contract which, fortuitously, was signed on the same day as that on which the wills were executed. Appellant argues that this contract is not, and could not be, a will, because it does not bear the attestation required by the Florida statutes for the execution of a will.

As the trial court indicated, and as the government contends, appellant ignores completely the theory upon which the government proceeds. That theory is that, although not a will in itself and not purported to be such, the contract became binding as a part of the testamentary act of the decedent because it was incorporated by reference in the will executed by Mrs. Batterton "pursuant to [This very] contract."

Although there is a paucity of Florida authority specifically dealing with the incorporation of other written documents as a part of a will by reference, it seems clear that the Florida courts have recognized what appears to be the overwhelming majority rule in the United States that, under proper circumstances a will may incorporate clearly identified existing writings as a part of the will itself. In Re: Gregory's Estate, Florida, 70 So.2d 903, the Florida Supreme Court construed a will as properly directing executors of a wife's estate to transfer the residium [sic] to the executor and trustee of her husband's estate to be distributed by them under the terms of his will, thus clearly giving testamentary effect to matters contained in an extrinsic writing (albeit the other writing was also a will itself). In its opinion the court discussed "the principle of incorporation by reference," and it stated that such principle "implies that the document referred to shall become a part of the will of the testator." This reference clearly indicated that the doctrine was recognized by that court as being recognized under proper circumstances. In note on Wills—Incorporation by Reference, in 144 A.L.R. 714-718, reference is made to the large number of states that recognize this doctrine. Apparently Connecticut is the only state found by the writer of that note which completely rejects the doctrine.

We conclude, then, as did the trial court, that the effect of the language utilized by Mrs. Batterton in her will, solemnly stating that it was executed "pursuant to the attached contract," and the fact that identification was made positive by the attachment of the contract to the will, had the same testamentary effect as if it had been a part of the will preceding the attestation clause or had been added by codicil thereafter.

Once we reach this point, it seems undisputed that the effect of the limitations contained in this provision of the will (the attached contract) has the effect in Florida jurisprudence of creating a life estate. See *Roberts* v. *Mosely,* 129 So. 835, and *Sanderson* v. *Sanderson,* 70 So.2d 364, and *Speck* v. *Bussey,* 147 So.2d 338.

The fact that a life estate was created does not of itself deny the marital deduction to the decedent, provided it meets certain standards. If, for instance, Mrs. Batterton's will, as completed by the contract, had a further clause providing that notwithstanding the other provisions of the will the surviving husband should have the absolute power of appointment to designate any person he chose, including himself or is [sic] own estate, as the final residuary, the marital deduction would be permissible. Here it is plain that the surviving husband had no such power. Although he had the right during his life to use as much of Mrs. Batterton's residuary estate as he found necessary or desirable to use during his life, he could not alienate it without consideration or give it away to any other than public charities, and he was bound for life to leave the residuary by will to the United Christian Missionary Society. It was thus a terminable estate.

The judgment is AFFIRMED.

(c) Judgment of the Circuit Court of Appeals Affirming District Court:

[Same Title]

Before TUTTLE and AINSWORTH, Circuit Judges, and MITCHELL, District Judge.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause, be, and the same is hereby affirmed;

It is further ordered and adjudged that the appellant, A. J. Batterton, Executor of the Will of Mary Todd Batterton, Deceased, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

December 10, 1968

Issued as Mandate: February 6, 1969.

(d) Opinion of the District Court Denying Petitioner's Motion for Summary Judgment and Granting Respondent's Motion for Summary Judgment:

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

A. J. BATTERTON, EXECUTOR OF THE WILL OF MARY TODD BATTERTON, DECEASED,
Plaintiff,
vs.
UNITED STATES OF AMERICA,
Defendant.
No. 67-361 Civ. T.

Opinion

(Filed: April 10, 1968)

The Plaintiff, A. J. Batterton, filed a motion for summary judgment, and the Defendant, United States of America, filed a cross motion for summary judgment. There is no factual dispute in this case.

On May 3, 1954, A. J. Batterton and his wife, Mary Todd Batterton, executed mutual wills, true copies of which are attached to the Complaint and marked Exhibits "B" and "C", respectively. Also, on May 3, 1954, the decedent and her husband, A. J. Batterton, entered into an agreement whereby neither would, without the other's consent, revoke or change their wills, and that neither would make any gift or transfer or assign any of his property without fair consideration, except for public charities.

The decedent's will disposed of her property as follows:

LAST WILL AND TESTAMENT OF MARY TODD BATTERTON

I, Mary Todd Batterton, of County of Hillsborough and State of Florida, pursuant to the attached contract, this day made with my husband, do hereby make, publish and declare the following my Last Will and Testament, hereby revoking all former wills:

1. Should my husband survive me, I give, devise and bequeath to my husband, A. J. Batterton, all of my property, real, personal, and mixed, wherever situated, whereof I may be seized or possessed, or to which I may be in any manner entitled, or in which I may be interested, at the time of my death, and I appoint him executor of my estate and waive the statutory requirement that he give bond as such executor, and hereby give him as such executor full power to sell, convey, transfer, and assign the property of my estate, or any interest therein.

2. Should my said husband predecease me, I give, devise, and bequeath all of my property, real, personal, and mixed, wherever situated, whereof I may be seized or possessed, or to which I may be in any manner entitled, or in which I may be interested, at the time of my death, to the United Christian Missionary Society, Missions Building, Indianapolis, Indiana, a corporation created by and existing under the laws of the State of Indiana, in trust nevertheless to be used for charitable purposes only, the income therefrom to be divided equally between Florida Christian Home, Edgewood, Jacksonville, Florida, Hazel Green Acadamy, Hazel Green, Kentucky, and said United Christian Missionary Society.

The Will of A. J. Batterton similarly devised all of his property to Mary Todd Batterton, if she should survive him, and to the United Christian Missionary Society, if she did not survive him. The agreement, a true

copy of which is attached to the Complaint and marked as Exhibit "D", reads in pertinent part as follows:

> This AGREEMENT, made this 3 day of May, 1954 by and between A. J. Batterton and Mary Todd Batterton, husband and wife,
>
> WITNESSETH: each hereby agrees, in consideration of the promises of each to the other, that neither will without the consent in writing of the other revoke, or make any Last Will and Testament different from, his or her Last Will and Testament copies of which are attached hereto, and that neither will during his or her lifetime make any gift, or transfer or assign any of his or her property without receiving a fair financial consideration, except for Public Charities.

At the time of the decedent's death, these wills and the agreement were in full force and effect.

On or about July 9, 1963, A. J. Batterton, as Executor of the Estate of Mary Todd Batterton, filed a federal estate tax return, a copy of which is attached to the Complaint and marked Exhibit "E". The estate tax return showed a total gross estate of $272,039.37. The total deductions, including the marital deduction of $131,025.91 and a $60,000.00 exemption, resulted in a taxable estate of $71,025.90.

On July 9, 1963, a tax in the amount of $12,339.04 was paid to the Internal Revenue Service and a tax in the amount of $248.21 was paid to the State of Florida.

By letter dated March 15, 1965, the Internal Revenue Service disallowed the marital deduction of $131,025.91 and reduced the value of stocks and bonds by $1,654.33, thereby resulting in a deficiency of tax in the amount of $35,830.66 to the Internal Revenue Service and $2,401.33

to the State of Florida. A copy of said letter is attached to the Complaint and marked Exhibit "F". This disallowance by the Internal Revenue Service was made on the theory that the interest passing to the decedent's surviving spouse was a terminable interest under Section 2056 (b) (1) of the Internal Revenue Code, and as such did not qualify for the marital deduction.

On July 12, 1965, a protest was filed with the Internal Revenue Service. As a result of a conference, the deficiency was reduced by the Internal Revenue Service from $35,830.66 to $17,853.84, which resulted by allowing the estate a charitable deduction in the approximate amount of $65,000.00. An agreement, Form 890-B, was signed by the Executor and submitted to the Internal Revenue Service. A copy of said agreement is attached to the Complaint and marked Exhibit "G". The review section of the Internal Revenue Service disallowed the adjustment and the full deficiency of $35,830.66 was reasserted.

On July 14, 1966, A. J. Batterton, as Executor, paid to the Internal Revenue Service the asserted deficiency of $38,480.20 plus interest to that date, totalling $45,148.34. A check for $2,813.90 was also paid to the State of Florida, representing a deficiency of tax of $2,401.33, together with interest of $412.57.

On January 20, 1967, the Internal Revenue Service refunded $2,969.82 to the estate, representing mainly the excess previously paid because the credit to the State of Florida had not been applied against the original deficiency.

On March 31, 1967, A. J. Batterton, as Executor, filed with the District Director of Internal Revenue a claim for refund, a copy of said claim being attached to the Com-

plaint and marked Exhibit "H". The claim for refund was to recover the sum of $47,936.84, or such greater amount as would be legally refundable, assessed and collected, plus interest as provided by law, on the ground that the property passing to him under the will was qualified for the marital deduction.

On July 13, 1967, the plaintiff was notified that the claim for refund had been disallowed in full. A copy of said letter of notification is attached to the Complaint and marked Exhibit "I". This suit was instituted on August 31, 1967.

This Court has jurisdiction of the parties and subject matter of this action under Title 28 U.S.C.A. §1346 (a) (1), as amended.

It is well settled that the Court must look to the law of Florida to determine what interest or right the surviving spouse, A. J. Batterton, received upon the death of Mary Todd Batterton. *Morgan* v. *Commissioner,* 309 U.S. 78. Under Florida law, when a testator makes a devise or bequest in fee simple and later in the same will restricts or limits the fee simple interest by a subsequent provision that which the beneficiary receives is a life estate. *Roberts, et al.* v. *Mosley,* 129 So. 835 (Fla., 1930); *Speck* v. *Bussey,* 147 So.2d 338 (Fla. D.C.A., 1962).

Although the restrictive provision in this case is in an agreement entered into between A. J. Batterton and Mary Todd Batterton on the same day as the mutual wills were made, the Court feels that the Florida courts would reach the same conclusion concerning Mr. Batterton's interest as that reached in the above cases. This Court concludes as a matter of law that the Plaintiff received a life estate.

The Plaintiff relies on *Simpson* v. *Ivey*, 67 So.2d 687 (1953) to argue that he has received a fee simple interest. However, the *Simpson* case is not on point since there was no restrictive provision involved in that case that merely a limitation that the decedent's wife would take the property only if she survived the decedent.

A life estate is considered a terminable interest under 26 U.S.C.A. §2056 (b) not eligible for the marital deduction unless five conditions under the Tax Regulations are met. These requirements are as follows:

26 C.F.R. §20.2056(b)-5(a):

(1) The surviving spouse must be entitled for life to all of the income from the entire interest or a specific portion of the entire interest, or to a specific portion of all the income from the entire interest.

(2) The income payable to the surviving spouse must be payable annually or at more frequent intervals.

(3) The surviving spouse must have the power to appoint the entire interest or the specific portion to either herself or her estate.

(4) The power in the surviving spouse must be exercisable by her alone and (whether exercisable by will or during life) must be exercisable in all events.

(5) The entire interest or the specific portion must not be subject to a power in any other person to appoint any part to any person other than the surviving spouse.

The only real questions are whether requirements (3) and (4) have been met. Requirement (4) states that the power "must be exercisable in all events." The Court finds that the limitation upon Mr. Batterton to sell the property, if at all, only "for a fair financial considera-

tion" and the limitation to donate the property, if at all, only to "public charities" are limitations sufficient to disqualify Mr. Batterton's power of appointment from meeting the requirement under (4). The Court therefore need not determine whether (3) has been met.

The Court concludes as a matter of law that the Plaintiff, A. J. Batterton, is not entitled to the marital deduction under 26 U.S.C.A. §2056.

The Court next considers Plaintiff's argument that he is then entitled to a charitable deduction under 26 U.S.C.A. §2055, if he is not entitled to the marital deduction.

Defendant readily concedes that the charity in question would be a qualified charity. The Plaintiff argues that the interest to be received by the United Christian Missionary Society is ascertainable, citing *Estate of Schildkraut* v. *C. I. R.*, 368 F.2d 40 (2nd Cir., 1966).

Here, Mr. Batterton has the power to completely divest his estate of any or all of the property prior to his death. Therefore the United Christian Missionary Society may take all or it may take nothing. There is no available means of determining what amount Mr. Batterton will consume or dispose of prior to his death. In the *Schildkraut* case, the Court had a standard available to it to determine what amount would be consumed or disposed of prior to the death of the surviving spouse and what would remain.

This Court concludes as a matter of law that the Plaintiff is not entitled to a charitable deduction under §2055 because the interest that will go to charity, if any, cannot be ascertained.

The Defendant's argument based on 26 U.S.C.A. §7422 that the Plaintiff is statutorily limited to the amount recoverable need not be considered at this time because of the above rulings made by this Court.

The Court further concludes as a matter of law that the Plaintiff's Motion for Summary Judgment should be denied and the Defendant's Cross Motion for Summary Judgment should be granted and judgment entered accordingly.

DONE and ORDERED at Tampa, Florida, this 9th day of April, 1968.

s/ Joseph P. Lieb
United States District Judge

APPENDIX B

Statutes Involved

Internal Revenue Code of 1954:

Section 2055—TRANSFERS FOR PUBLIC, CHARITABLE AND RELIGIOUS USES

(a) In general—For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made before the date prescribed for the filing of the estate tax return)—

(1) to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes;

(2) to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation;

(3) to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, and no substantial part of the activities of such trustee or trustees, or of such fraternal society, order, or association, is carrying on propaganda, or otherwise attempting, to influence legislation; or

(4) to or for the use of any veterans' organization incorporated by Act of Congress, or of its departments or local chapters or posts, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

For purposes of this subsection, the complete termination before the date prescribed for the filing of the estate tax return of a power to consume, invade, or appropriate property for the benefit of an individual before such power has been exercised by reason of the death of such individual or for any other reason shall be considered and deemed to be an irrevocable disclaimer with the same full force and effect as though he had filed such irrevocable disclaimer.

* * * * * * *

(d) Limitation on deduction—The amount of the deduction under this section for any transfer shall not exceed the value of the transferred property required to be included in the gross estate.

(e) Disallowance of deductions in certain cases—

(For disallowance of certain charitable, etc., deductions otherwise allowable under this section, see sections 503 and 681.)

(26 U.S.C. 1954 ed., Sec. 2055)

Internal Revenue Code of 1954:

Section 2056—BEQUESTS, ETC., TO SURVIVING SPOUSE

(a) Allowance of marital deduction—For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) General rule—Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest—

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse; and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under subparagraphs (A) and (B))—

(C) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For purposes of this paragraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

* * * * * * *

(5) Life estate with power of appointment in surviving spouse—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

(A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

(B) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

* * * * * * *

(c) Limitation on aggregate of deductions—

(1) General rule—The aggregate amount of the deductions allowed under this section (computed without regard to this subsection) shall not exceed 50 percent of the value of the adjusted gross estate, as defined in paragraph (2).

(e) Definition—For purposes of this section, an interest in property shall be considered as passing from the decedent to any person if and only if—

(1) such interest is bequeathed or devised to such person by the decedent;

* * * * * * *

(26 U.S.C. 1964 ed., Sec. 2056)

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1238

A. J. BATTERTON, EXECUTOR OF THE WILL OF MARY TODD BATTERTON, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A3–A7) is reported at 406 F. 2d 247 and its opinion on rehearing (Pet. A1–A2) is reported at 406 F. 2d 250. The opinion of the district court (Pet. A9–A16) is reported at 287 F. Supp. 681.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1968 (Pet. A8). Petitioner's petition for rehearing was denied on January 28, 1969 (Pet. A1–A2). The petition for a writ of certiorari was filed on April 8, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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QUESTION PRESENTED

Whether a decedent's estate is entitled to a marital deduction under Section 2056 of the Internal Revenue Code of 1954 when the surviving spouse is given a life estate in the decedent's property with power to consume the property for his own benefit or to give it to "public charities," but is otherwise without power to give it away and is without power to dispose of it by will.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Section 2056 of the Internal Revenue Code of 1954 are set forth in the Appendix, *infra*, pp. 8–10.

STATEMENT

Petitioner brought this suit in his capacity as executor of the estate of his wife, Mary Todd Batterton, who died on April 21 1962 (Pet. A4, A11). On May 3, 1954, petitioner and his wife executed mutual wills under which each gave his property to the survivor with remainder to the United Christian Missionary Society. They simultaneously entered into a contract whereby neither would, without the other's consent, revoke or change his will, and neither would make any inter vivos gift or transfer of his property without fair consideration, except to public charities (Pet. A3–A4, A9–A11). Under Florida law,[1] the surviving spouse was the recipient of a life estate with the right to use as much of the decedent's residuary estate for his own benefit as he found necessary or desirable dur-

[1] Florida law applies since the decedent died a domiciliary of Florida and the wills and contract were executed there (Pet. A4, A9–A11, A13).

ing life and the power to donate to public charities as much of the decedent's estate as he deemed desirable. However, the surviving spouse had no right to donate the decedent's residuary estate to private individuals, and was free to leave it by will only to the United Christian Missionary Society.[2]

In the federal estate tax return filed for the decedent's estate, petitioner claimed a marital deduction of one-half the gross estate, or $131,025.91. The Commissioner of Internal Revenue disallowed the deduction on the theory that the interest passing to the decedent's surviving spouse was a terminable interest under Section 2056(b)(1) of the Internal Revenue Code of 1954 (Pet. A11–A12). In petitioner's negotiations with the Internal Revenue Service, he claimed that the estate should be allowed either a marital deduction or a charitable deduction (Pet. A12). The Commissioner did not allow the charitable deduction on the grounds that the value of the interest that might go to charity could not be ascertained (Pet. A12, A15).[3]

In the refund suit which followed, the district court sustained the Commissioner's position (Pet. A14–A15). The court of appeals affirmed (Pet. A3–A7). In its petition for rehearing before the court of appeals, petitioner asserted that the surviving spouse could only give property he did not consume to chari-

[2] Petitioner does not dispute in this Court the holdings of the court of appeals and the district court under Florida law. (Pet. 4.)

[3] Petitioner now concedes that the estate is not entitled to a charitable deduction under Section 2055 of the 1954 Internal Revenue Code (Pet. 13).

ties qualified to receive bequests that are deductible under Section 2055, and that for this reason a marital deduction should be allowed under Section 2056. The court of appeals denied this petition, reasoning that petitioner's (Pet. A2) "contractual and testamentary requirements as to his disposition of this estate could have been fully carried out without his ever naming a charity meeting the statutory exemption standards at all."

ARGUMENT

The decision below is correct and there is no conflict of decisions or any other ground for further review.

1. Sections 2056 (a) and (c) of the Internal Revenue Code of 1954, Appendix *infra*, pp. 8, 10, allow a deduction from the gross estate of a bequest to the decedent's surviving spouse, up to one-half the value of the adjusted gross estate. Under Section 2056(b), however, the deduction is unavailable if the interest passing to the surviving spouse is a terminable interest, *i.e.*, a life estate or some other interest that terminates "on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur * * *". A statutory exception to the terminable interest rule is set forth in Section 2056(b)(5). It allows the marital deduction if the surviving spouse receives a life estate coupled with a power of appointment over the corpus that he may exercise "alone and in all events" in his own favor or in favor of his estate. The purpose of Section 2056 (b)(5) is to treat equally those spouses who have virtual ownership of the property for their life and those who are fee owners of the property. See S. Rep.

1013, Part. 2, 80th Cong., 2d Sess., pp. 16–17; see, also, Section 20.2056(b)–5(a) and (g) (2) and (3) of the Treasury Regulations on Estate Tax. Thus the marital deduction is available if the surviving spouse is given either the right to treat the property entirely as his own during his lifetime or the unrestricted power to dispose of it by will as he sees fit. See Regulations Sections 20.2056(b)–5(g)(5).

Although Mrs. Batterton's will allows petitioner more powers over the corpus than accompany a simple life estate, he was under an obligation not to alienate the property during his life without fair consideration except for gifts for "public charities". Since he therefore is not given the unqualified right to deal with the property as his own during his lifetime, he did not have the unrestricted rights that in the first instance would qualify for a marital deduction. This, coupled with the contractual restriction that required him to will the property to the United Christian Missionary Society, meant that he did not have the type of power of appointment that would qualify an otherwise ineligible life estate for the marital deduction under Section 2056(b)(5). In short, he was granted neither lifetime nor testamentary powers that give rise to the level of virtual ownership required for the marital deduction, and the court of appeals correctly ruled that the deduction is unavailable.

2. Petitioner's argument here, like his petition for rehearing in the court of appeals, proceeds in two stages. First it is claimed that the provision limiting petitioner's inter vivos gifts of his wife's estate to amounts given "public charities" should be inter-

preted as requiring that the gifts be to such charities as would be eligible to receive bequests deductible under Section 2055 of the Internal Revenue Code. The second point is that Section 2056 should be interpreted to allow a marital deduction in this case if the phrase "public charities" is restricted to organizations qualifying under Section 2055.

Even assuming that the court of appeals erred in holding that the phrase "public charities" encompasses a broader class of organizations than those qualifing under Section 2055, petitioner would still have no statutory basis for a marital deduction. Section 2056 allows the marital deduction only if the surviving spouse has a fee interest or a life interest coupled with a power of appointment over the corpus exercisable "alone and in all events" during his life or at his death. Although Section 2055 allows a deduction for bequests to qualified charities, including bequests of remainders, Section 2055 does not apply here since, as the petitioner expressly concedes (Pet. 13), "the value of the charitable remainder is not presently ascertainable. *Merchants National Bank of Boston* v. *Commissioner,* 320 U.S.. 256".[4] The very fact that petitioner's power to give the property away was restricted to gifts to "public charities" strips him of the legal or virtual ownership of the fee that, under Section 2056, is the prerequisite to the marital deduction, and the more circumscribed the group of organi-

[4] See, also, *Commissioner* v. *Sternberger's Estate*, 348 U.S. 187; *Henslee* v. *Union Planters Bank*, 335 U.S. 595; *Humes* v. *United States*, 276 U.S. 487; 4 Mertens, *Law of Federal Gift and Estate Taxation* (1959), pp. 397–398; Section 20.2055–2(a) of the Treasury Regulations on Estate Tax (1954 Code).

zations which may be included in the phrase "public charities", the more antithetical the situation is to the language and purposes of Section 2056. The will-cum-contract here simply fails to comply with the statutory terms and therefore no marital deduction is available.

3. The disposition of this case turns entirely on the language of two instruments—a will and a contract—that are peculiar to this case. We are aware of no other matter where a comparable problem is presented. Therefore, this case does not have the general importance that would warrant review in this court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY 1969.

APPENDIX

The pertinent provisions of Section 2056 of the Internal Revenue Code of 1954 are as follows:

SEC. 2056. BEQUESTS, ETC., TO SURVIVING SPOUSE.

(a) *Allowance of Marital Deduction.*—For purposes of the tax imposed by section 2001, the value of the taxable estate shall, except as limited by subsections (b), (c), and (d), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(b) *Limitation in the Case of Life Estate or Other Terminable Interest.*—

(1) *General rule.*—Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed under this section with respect to such interest—

(A) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(B) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such

termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under subparagraphs (A) and (B))—

(C) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For purposes of this paragraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

* * * * *

(5) *Life estate with power of appointment in surviving spouse.*—In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

(A) the interest or such portion thereof so passing shall, for purposes of subsection (a), be considered as passing to the surviving spouse, and

(B) no part of the interest so passing shall, for purposes of paragraph (1)(A), be considered as passing to any person other than the surviving spouse.

This paragraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

* * * * *

(c) *Limitation on Aggregate of Deductions.*—

(1) *General rule.*—The aggregate amount of the deductions allowed under this section (computed without regard to this subsection) shall not exceed 50 percent of the value of the adjusted gross estate, as defined in paragraph (2).

* * * * *

(26 U.S.C. 2056.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1238

A. J. BATTERTON, EXECUTOR OF THE WILL OF MARY TODD BATTERTON, DECEASED, *Petitioner*,

v.

THE UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

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1. The Government's brief in opposition argues only that petitioner's position on the second question presented by the petition is erroneous. The Government has not one word to say in opposition to petitioner's position on the first question presented by the petition.

It does not try to defend the court of appeals' ruling on question one; it does not deny petitioner's contention that the court of appeals' ruling on this question conflicts with an entire body of tax law. And it could hardly argue that question one is not of great and general importance justifying this Court's attention. Indeed the only discussion whatever in the Government's brief on the first question presented by the petition is that the petitioner is probably right and the court of appeals wrong. The entire discussion is as follows:

> Even assuming that the court of appeals erred in holding that the phrase "public charities" encompasses a broader class of organizations than those qualifying under Section 2055, petitioner would still [lose his case on the basis of question two]. [Br. in Opp. 6]

But the Government's brief is less than candid in not plainly telling this Court that the court of appeals ruled against petitioner, not on question two of the petition, but on question one—and the Government is willing to assume the court below was wrong on question one.

The crucial sentence of the opinion below and its clear *ratio decidendi* is the following:

> The simplest answer to the contention here is that there is no necessary relation between the "charities" to which the surviving spouse here was permitted to make gifts or bequests and the "charities" covered by Section 2055 of the Internal Revenue Code. . . [Opinion on Rehearing, App. 2]

This is the court of appeals' position with respect to question one and the basis on which it ruled against petitioner.

On question two, the court of appeals assumed petitioner was correct (Opinion on Rehearing, App. 1-2). The Government does not argue that question one is not squarely presented, nor that the court of appeals decided the case against petitioner on question two. The Government simply ignores the fact that the court below ruled against petitioner on question one, not question two.

2. In effect, the Government is contending that certiorari should be denied despite the fact that the court of appeals decided an important question erroneously, because the court of appeals' decision is supportable on another ground (that is, question two). This, we submit, is bad law and bad policy. We recognize that this Court reviews cases, not opinions. It would nevertheless be unwise for this Court to deny certiorari where an important question was erroneously decided by the court below simply because the decision is supportable on another ground. The appropriate course in such a case would be for this Court to reverse and remand so that the court below many consider the grounds on which its decision may appropriately be based. (This is especially true here since the court of appeals assumed the decision was not supportable on the basis of the Government's position on question two and, but for the court of appeals' erroneous ruling on question one, judgment would have been in petitioner's favor.) Only in this way can this Court's function as the ultimate guide for lower courts on important questions—especially where, as here, there is a conflict—be preserved.

To adopt the position implicit in the Government's brief would be to leave on the books a clearly erroneous decision on a question of great public importance.

While the Solicitor General now seeks to support the decision below on grounds other than those stated in the opinion, other Government officials will read the decision for what it says. The Internal Revenue Service will use it for its *in terrorem* effect in almost every dispute involving a question of a charitable deduction. This decision will add another string to the Government's bow in almost every case involving a question of a charitable deduction by giving the Government the argument ". . . and even if we are wrong on all our contentions stated thus far, you will still lose because your instrument speaks only about 'charities', not 'charities which qualify under Section 2055 [or the analogous section relating to income taxes]' ". And the Internal Revenue Service will then cite the instant case—if this Court should deny certiorari.

At the moment, petitioner is threatened with an "assumption squeeze". The court below assumed petitioner was correct on the only issue he presented but decided against him—erroneously—on another issue. The Government assumes this ruling to be erroneous but argues that the lower court's *assumption* was also erroneous—and on that ground asks this Court to deny certiorari. It is obviously unfair to petitioner to deny him his victory when the court below assumed he was correct on the only issue he presented and the Government is willing to assume that the court of appeals was wrong on the question it decided. But aside from the unfairness to petitioner if he were to be crushed in this "assumption squeeze", it would also be unwise for this Court as a matter of policy to permit a clearly erroneous opinion on an important question to stand because the decision was supportable on other grounds.

3. Thus far in this reply brief we have assumed *arguendo* that the decision below is supportable on another ground. As a matter of fact, it is not. And so we have argued in that part of our petition relating to question two. And so the court of appeals assumed. The Government contends otherwise, but it has not even tried to address itself to our arguments. It presents only the most general discussion of question two in a brief which could have been written without even reading our petition. In these circumstances, no more need be said on this issue, except to reiterate our position that on the basis of the argument in our petition, certiorari should be granted on issue two as well.

Respectfully submitted,

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